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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1650**

Song Sibell,
Relator,

vs.

U. S. Postal Service,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 29, 2020
Affirmed
Connolly, Judge**

Department of Employment and Economic Development
File No. 37272296-5

Song Sibell, Lino Lakes, Minnesota (pro se relator)

U.S. Postal Service, Earth City, Missouri (respondent employer)

Anne B. Froelich, Keri A. Phillips, Department of Employment and Economic
Development, St. Paul, Minnesota (respondent department)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

In this appeal from an order declaring her ineligible for unemployment benefits, relator argues that (1) the hearing notice she received violated her due-process rights, (2) the unemployment-law judge (ULJ) made erroneous credibility and legal determinations, and (3) she received an unfair hearing. Because relator received a fair hearing and no due-process violation occurred, and because the record supports the ULJ's decision, we affirm.

FACTS

Relator began working for respondent U.S. Postal Service (USPS) in 1998. In December 2018, relator accused two coworkers of sleeping with her husband and hit one of them (the victim employee) with a roll of labels. As a result, USPS suspended relator and ultimately decided to terminate her. Although relator and USPS later reached a settlement under which she regained her employment, relator did not work from January 2, 2019, through March 28, 2019.

While unemployed, relator applied for, and received, unemployment benefits from respondent Department of Employment and Economic Development (DEED). But DEED later determined that relator was ineligible for unemployment benefits because she was discharged for employment misconduct, resulting in an overpayment of \$1,250 in unemployment benefits. Relator timely appealed that decision and the parties had a two-day hearing before the ULJ.

At the hearing, a USPS manager, testified that USPS suspended relator after the December 2018 incident. The manager also testified about five employee witness statements that the ULJ received as evidence. In one statement, the victim employee explained that relator hit her with a roll of labels and pushed her in the chest. Two other employees confirmed that the victim employee had shown them a red mark on her hand following the incident with relator.

In contrast, relator testified that the other employee pushed her first, causing her to push back. Documentary evidence and testimony established that relator has a diagnosed mental-health disorder, for which she was not taking medication when the incident occurred.

After receiving testimony and exhibits, the ULJ issued a written order determining that relator had been ineligible for unemployment benefits because she committed aggravated employment misconduct. Upon relator's timely request for reconsideration, the ULJ issued an order affirming the prior decision.

D E C I S I O N

On appeal, this court reviews the ULJ's decision on reconsideration and may affirm, remand, or reverse that decision. Minn. Stat. § 268.105, subd. 7(d) (2018). In urging reversal, relator makes three main arguments, which we address in turn.

I. Alleged Due-Process Violation

We first consider relator's argument that DEED's Determination of Ineligibility Notice violated her due-process rights. For support, relator highlights an inconsistency between DEED's notice and the ULJ's ultimate decision: the ineligibility notice stated that

relator's conduct did not constitute aggravated employment misconduct, but the ULJ determined that she was ineligible for unemployment benefits for that precise reason.

A challenge involving the sufficiency of a notice presents a legal question that we review de novo. *In re License of W. Side Pawn*, 587 N.W.2d 521, 522 (Minn. App. 1998), review denied (Minn. Mar. 30, 1998). Both the United States and Minnesota Constitutions provide that “[n]o person shall . . . be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V; Minn. Const. art. I, § 7. When a due-process challenge involves the adequacy of notice, we consider “whether the notice was reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Godbout v. Dep’t of Emp’t & Econ. Dev.*, 827 N.W.2d 799, 802 (Minn. App. 2013) (quotation omitted).

While relator is correct in noting a discrepancy between DEED's initial Determination of Ineligibility Notice and the ULJ's ultimate decision, the record does not suggest that this discrepancy violated her due-process rights. Relator argues that this discrepancy led her to believe that “aggravated [employment] misconduct would not be a possible outcome of the appeal.” But the notices themselves do not support this argument. The hearing notice that relator received stated that the issue to be addressed at the hearing was whether relator could receive unemployment benefits based on her separation from USPS. And while DEED made an initial determination that relator's conduct was not aggravated employment misconduct, that determination never suggested that aggravated employment misconduct would not be an issue at the appeal hearing.

We conclude that the hearing notice did not violate relator’s due-process rights. Instead, this notice informed relator of the issue to be considered at her appeal hearing and allowed her to present her objections to DEED’s ineligibility determination accordingly.

II. The ULJ’s Credibility Determinations and Ultimate Decision

Second, relator makes several arguments attacking the ULJ’s written order. In cases involving unemployment benefits, an appellate court reviews the ULJ’s factual findings “in the light most favorable to the decision.” *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether an employee committed an act that disqualifies him or her from unemployment benefits presents a question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). An appellate court reviews de novo whether a particular act disqualifies a person from receiving unemployment benefits. *Stagg*, 796 N.W.2d at 315. But whether an employee committed a particular act is a factual question. *Skarhus v. Davanni’s, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Under Minnesota law, persons discharged from employment for aggravated employment misconduct cannot receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(2) (2018). Aggravated employment misconduct includes “[t]he commission of any act on the job . . . that would amount to a gross misdemeanor or felony . . . if the act had a significant adverse effect on the employment.” Minn. Stat. § 268.095, subd. 6(a)(1) (Supp. 2019).

Here, the ULJ determined that relator committed aggravated employment misconduct because her conduct constituted fourth-degree assault—a gross misdemeanor. Minnesota law defines assault harm as “the intentional infliction of . . . bodily harm upon

another.” Minn. Stat. § 609.02, subd. 10(2) (2018). An individual commits fourth-degree assault if they (1) assault an employee of the United States Postal Service who is performing their job duties; (2) should reasonably know that the employee is a postal worker performing their employment duties; and (3) inflict “demonstrable bodily harm.” Minn. Stat. § 609.2231, subd. 10(a) (2018). While no statute defines the phrase “demonstrable bodily harm,” we have approved a jury instruction defining the phrase as “bodily harm capable of being perceived by a person other than the victim.” *State v. Backus*, 358 N.W.2d 93, 95 (Minn. App. 1984).

Substantial record evidence supports the ULJ’s decision. The victim employee’s statement contains evidence meeting all three fourth-degree assault elements: (1) relator pushed the victim employee and hit her with a roll of labels; (2) relator should have reasonably known that the victim employee was performing employment duties as a USPS employee; and (3) other employees saw a red mark on the victim employee’s hand after the incident. It is also clear from the record that relator’s actions had a significant adverse effect on employment. This incident involved relator’s verbal altercation with two coworkers and led to a physical assault of one. USPS had to conduct a follow-up investigation after the incident. And we have held that “employers may reasonably expect employees to refrain from engaging in even single acts of combative physical conduct.” *Potter v. N. Empire Pizza, Inc.*, 805 N.W.2d 872, 878 (Minn. App. 2011), *review denied* (Minn. Nov. 15, 2011).

While relator offers several arguments for reversal, none is persuasive. First, she criticizes the ULJ’s reliance on hearsay evidence, specifically the interview statements

from her coworkers. Relator is correct that the USPS investigative interview summaries and the statements from her coworkers constitute hearsay. *See* Minn. R. Evid. 801(c) (defining hearsay as an out-of-court statement offered to prove the truth of the matter asserted). But a ULJ may receive hearsay evidence that has probative value “if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs.” Minn. R. 3310.2922 (2019).

We conclude that the ULJ did not err in using the hearsay interview summaries and employee statements to reach a decision. These materials represent the type of evidence “on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs.” *See id.* The employee statements were signed, dated, and possessed probative value because they represented first-hand accounts of the incident at issue. *See, e.g., Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 288 n.1 (Minn. 2006) (relying on facts from hearsay letter of third-party who did not participate in administrative hearing). Thus, the ULJ did not err in considering this evidence.

Second, relator argues that the ULJ erred in finding that the victim employee had a red mark on her hand because nothing causally connected relator’s action to that injury. An appellate court does not disturb a ULJ’s factual findings when there is evidence in the record that supports them. *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). On this point, the victim employee provided a signed statement that relator struck her. And two other employees stated that the victim employee showed them a red mark on her hand following the encounter with relator, while another employee saw her rubbing her hand after the incident.

While the statements from the other employees about seeing the red mark constitute circumstantial evidence, such evidence can support a decision if it “justifies the fact-finder’s reasonable inferences and these inferences outweigh conflicting evidence.” *Kellogg v. Woods*, 720 N.W.2d 845, 851 (Minn. App. 2006). The ULJ here reasonably inferred from this evidence that relator struck the victim employee, creating a red mark on her hand. This reasonable inference outweighs relator’s unsupported contention that she never struck the victim employee.

Third, relator asserts that the ULJ erred by classifying her conduct as fourth-degree assault because she lacked the requisite mens rea. Assault-harm—the conduct at issue—is a general-intent crime and requires proof that the defendant intended to do the physical act. *State v. Fleck*, 810 N.W.2d 303, 309-10 (Minn. 2012). Put differently, “the defendant need only intend to commit an act that constitutes a battery.” *State v. Dorn*, 887 N.W.2d 826, 831 (Minn. 2016).

The record supports the ULJ’s decision as the evidence shows that relator pushed another employee and struck her in the hand with a roll of labels. And nothing in the record suggests that relator’s mental-health disorder prevented her from knowing the nature of her actions or that they were wrong. In fact, relator admitted to pushing the victim employee, although she denied striking her with the roll of labels. Thus, relator’s mental-health disorder did not prevent the ULJ from determining that her conduct constituted fourth-degree assault.

Fourth, relator faults the ULJ for discrediting her testimony. We defer to the ULJ’s credibility determinations. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn.

App. 2008), *review denied* (Minn. Oct. 1, 2008). When a testifying witness's credibility affects the outcome of a decision, the ULJ must provide the basis for crediting or discrediting the testimony. Minn. Stat. § 268.105, subd. 1a(a) (2018).

Here, the record supports the ULJ's decision to discredit relator's testimony because she could not remember certain events from the date in question. Several times during her testimony, relator could not recall details or events that happened on the incident date. Witness recall is a proper credibility factor for an agency decision-maker to consider. *See Ywsyf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532 (Minn. App. 2007). Because relator had trouble remembering details surrounding the incident, the ULJ did not err in discrediting her testimony.¹

We also reject relator's argument that the ULJ erred in crediting the statements from her coworkers over her live testimony. These statements, which USPS manager T.M. testified about, largely matched one another and contradicted relator's version of events. The ULJ did not err by crediting the more abundant evidence and discrediting relator's testimony. *See id.* (noting that substantial evidence supports a finding when a witness's testimony was credited and corroborated by other record evidence).

III. Alleged Bias Against Relator

¹ Relator also asserts that a reasonable witness, let alone one with a mental-health disorder, could not recall every aspect of an incident. But the incident occurred about six months before the hearing. And relator contends that the ULJ should have relied on her interview with the postal inspector to fill in the gaps for her lack of recall. But in that interview, relator did not recall all details surrounding the incident, even though she was interviewed three days after it happened.

Lastly, relator asserts that she did not receive a fair hearing because the ULJ exhibited bias against her.² We may reverse a ULJ's decision if it stems from an unlawful procedure. Minn. Stat. § 268.105, subd. 7(d)(3). When a party is unrepresented, the ULJ should help that party present evidence. Minn. R. 3310.2921 (2019). But the ULJ is not an advocate for an unrepresented party because the unemployment hearing is adversarial in nature and requires the ULJ to remain neutral. *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 32 (Minn. App. 2012).

Relator argues that the ULJ's repeated questioning of her on the same topic shows bias. But a reading of the record reveals that the ULJ was simply trying to understand relator's version of events about the incident. The record also shows that the ULJ asked follow-up questions to another witness. And the record reflects that the ULJ had trouble comprehending parts of relator's testimony, some of which was received from the interpreters who translated for relator at the hearings.

Relator also asserts that the ULJ's credibility determinations demonstrate bias against her. But this argument fails because, as discussed above, the record supports the ULJ's credibility findings. In sum, after a careful review of the record, we conclude that relator received a fair hearing, free from any bias. *See Ywswf*, 726 N.W.2d at 529-30

² To support her argument that the ULJ exhibited bias against her, relator stresses that the ULJ unlawfully amended his prior decisions. We held in *Rowe v. Dep't of Emp't & Econ. Dev.* that a ULJ may amend a decision before the 30-day appeal timeframe passes. 704 N.W.2d 191, 196-97 (Minn. App. 2005). Here, the ULJ issued his first decision on June 25, 2019. The ULJ then issued two amended decisions on July 2 and July 10, both within the 30-day window.

(rejecting relator's unfair-hearing argument after reviewing the transcript and concluding that the ULJ conducted a fair hearing).

Affirmed.